BEFORE THE

SURFACE TRANSPORTATION

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EX PARTE NO. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

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# REPLY COMMENTS OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: April 1, 2005

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# REPLY COMMENTS OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

In their Opening Comments, National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and National Industrial Transportation League ("NITL") (collectively, the "Shipper Associations"), called for termination of antitrust immunity for the National Classification Committee ("NCC") and the major regional rate bureaus. In the alternative, the Shipper Associations called for the imposition of additional conditions if antitrust immunity is renewed for the NCC or any regional bureau.

In their opening comments, NCC and the rate bureaus have essentially argued that their antitrust immunity should be continued because they are operating in compliance with the terms of their agreements as approved by the STB in the NCC and rate bureau reform proceedings.[1] However, this proceeding involves more fundamental issues.

[1] Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 118 (Sub-No. 2), et al., EC-MAC Motor Carriers Service Association, Inc., et al.

The concerns that led the Shipper Associations and other shipper parties to call for termination or modification of antitrust immunity for carrier collective action included (but were not limited to) the following:

- lack of transparency
- disparate burdens, with the result that higher class rates and class ratings predominate
- standards that favor carriers over shippers
- general rate increases that may overstate cost increases
- no prohibition against using collective carrier action to increase profits
- smaller discounts than shippers were led to expect
- a limited voice, and no voting representation, for shippers.

NCC and the rate bureaus were unaware of the details of shipper concerns expressed in the opening round of comments in this proceeding. Accordingly, their reactions will presumably be provided in their reply comments, which the Shipper Associations will address in rebuttal comments. There are nevertheless several points the Shipper Associations would make regarding the opening comments filed by NCC and the rate bureaus.

NCC argues that Congress supports continued antitrust immunity for collective motor carrier action. Comments at 10-13. However, it does not mention the legislative history of the Motor Carrier Act of 1980, where the House Report stated:

> No issue has received more attention during the debate before the Committee than whether this immunity should be allowed to continue. The debate centered on whether there continues to be a reasonable public quo in return for the collective ratemaking quid of the Reed-Bulwinkle Act.

House Report No. 96-1069, reprinted in 1980 U.S. Code Cong. & Ad. News 2283, 2309.

While it is true that Congress has not itself ordered antitrust immunity terminated, Congress has nevertheless preserved the authority and duty of the Board to "change the conditions of approval or terminate [an agreement] when necessary to protect the public interest." 49 U.S.C. § 13703(c). Since 1980, competition in the trucking industry has intensified, as Congress intended. However, there remain incentives for the motor carrier members of the NCC and rate bureaus to use their antitrust immunity in anticompetitive ways, and these incentives may increase as competition in the marketplace increases.

NASSTRAC and NITL submit that appropriate test for the Board to apply in this proceeding is not whether there are arguable benefits to ratemaking based on NCC class ratings and rate bureau class rates and general rate increases. Such a standard could easily permit extensive anticompetitive conduct, so long as the carriers can point to allegedly greater public benefits (which they see as including benefits to their carrier members). Rather, features of NCC and rate bureau operations that are actually or potentially anticompetitive should be eliminated or minimized.

SMC's comments include an extensive discussion of its "Carrier Cost Index," and the reasons SMC believes it to be superior to the Consumer Price Index and Producer Price Index issued by the Bureau of Labor Statistics. Assuming the CCI is tailored more closely to the cost experience of motor carriers than is the CPI or PPI, it does not follow that the CCI should be presumed accurate.

As this agency recognized with respect to its RCAF, indices that track input prices may overstate costs if they are not adjusted for productivity gains. See Railroad Cost Recovery Procedures – Productivity Adjustment, 5 I.C.C. 2d 434 (1989), aff'd. sub nom.

Edison Electric Institute v. ICC, 969 F.2d 1221 (D.C. Cir. 1992). Periodic rebasing may also be necessary. It is not clear that the CCI satisfies these requirements.

SMC has asserted that its CCI does not include a component for fuel cost increases, which are frequently recovered in fuel surcharges that motor carriers collect in addition to their rates. What steps, if any, do other rate bureaus take to assure that shippers are not paying fuel cost increases twice, once through GRIs to bureau class rates, and again through fuel surcharges? Moreover, the other rate bureaus are conspicuously silent on the basis for their GRIs. Do they use an index, and if so, what is it and is it appropriately checked and adjusted for accuracy?

We would note that the Board is also considering the application of SMC for nationwide authority in Section 5a Application No. 46 (Sub-No. 20), Southern Motor Carriers Rate Conference, Inc. NITL has opposed such authority, and NASSTRAC has opposed it unless additional conditions are imposed, but the possibility of a fundamental restructuring of motor carrier collective ratemaking is presented here. We do not seek to reargue the issues created by SMC's request for nationwide authority. However, particularly because of the confluence of these proceedings, it is fair to ask about the membership, staffing and finances of the carrier organizations seeking five more years of antitrust immunity.

SMC's website provides extensive information about membership and structure, and shippers may join SMC as associate members and may attend and speak at (though not vote at) SMC General Rate Committee meetings. The websites of Middlewest and Pacific Inland Tariff Bureau also list their members, and their opening statements indicate that shippers may be heard at their open meetings. In this proceeding, the Board

should require similar notice and open meetings from all rate bureaus, and should require the rate bureaus to submit regular financial and membership reports to the agency, to permit the agency and the shipping public to better monitor the activities and financial position of the various rate bureaus.

Finally, several rate bureaus seek to justify continued antitrust immunity by arguing that it is necessary for interline movements. See, e.g., the comments of Rocky Mountain Tariff Bureau. So far as we are aware, railroads also negotiate joint rates and manage to do so without rate bureaus. Moreover, the likelihood of an antitrust action based on the discussion of joint rates by interlining carriers is extremely remote, as long as there are no other anticompetitive activities connected with the joint rate setting. In any event, this function, assuming it is beneficial and would be jeopardized without antitrust immunity, cannot justify other actions of the rate bureaus that present the reality or the risk of anticompetitive conduct, shielded by antitrust immunity.

Motor carrier rates and rate increases should be set predominantly, if not entirely, through competition and negotiations in a deregulated marketplace. The opening comments of the NCC and rate bureaus do not justify maintaining the status quo.

Accordingly, the antitrust immunity of the NCC and rate bureaus should be terminated or further conditioned as recommended by NASSTRAC and NITL.

Respectfully submitted,

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